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JUL - 6 2004

No. 02-1624

IN THE

Supreme Court of the United States

ELK GROVE UNIFIED SCHOOL DISTRICT,
and DAVID W. GORDON, Superintendent, EGUSD

Petitioners,

v.

MICHAEL A. NEWDOW,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S PETITION FOR REHEARING

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July 6, 2004

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INTRODUCTION

On June 14, 2004, the Court handed down its judgment in the instant case. *Elk Grove Unified Sch. Dist. v. Newdow*, 02-1624, slip op. (June 14, 2004). Because the ruling, itself, results in the abrogation of a right secured under the Constitution of the United States, Respondent Michael A. Newdow – pursuant to S. Ct. R. 44 – respectfully requests that the Court reconsider its decision.

SUMMARY OF THE ARGUMENT

No one has a right to obtain discretionary review in the Supreme Court of the United States. However, this case involves far more than a mere denial of certiorari. Here, Respondent's fundamental constitutional right to access the entire federal court system has been impaired. That severe intrusion upon a basic liberty interest requires review.

Holding the belief that a clear Establishment Clause violation is perpetrated daily in his daughter's public schools, Respondent sought to protect her and himself from the resultant harms. He thus invested more than six years attempting to end the violation. He did this by employing his constitutionally based, fundamental right of access, and he prevailed in the Ninth Circuit Court of Appeals. Yet – citing "prudential" concerns regarding family law[1] – this Court has

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[1] It should be noted that (a) Respondent was on fine terms with the mother of his child when he first instituted this challenge; (b) it was not until more than a year and a half later that there were any family court filings at all; (c) there was no diminution of his legal custody of his daughter until after all the briefing was completed in the Ninth Circuit Court of Appeals; and (d) no challenge to his standing as a parent was raised until after his appellate victory was registered. Thus, his utilization of the federal courts was completely justified and in good faith

reversed the lower court's ruling, thereby depriving Respondent of all access to the federal judiciary in this litigation.

Under this Court's jurisprudence, strict scrutiny must be employed when analyzing a governmental infringement upon a basic, constitutionally guaranteed right such as the right of access to the federal courts. Thus, government must enunciate an interest that is compelling, the infringement must be narrowly tailored (so that it is as minimally restrictive as possible), and the burden of proof is upon the government to demonstrate that these conditions are met. In this case, the Court has ignored a readily available, less restrictive means of addressing its "prudential" concerns. Certifying a question regarding the scope of the family court's custody order to the California Supreme Court would accomplish the Court's goals without unnecessarily abrogating Respondent's fundamental constitutional right to access the federal courts. This certification process should, therefore, be utilized.

In actuality, the Court could ignore the question of narrow tailoring altogether by reassessing the relationship between the practice being challenged and the ongoing state domestic relations litigation. The decision of a public school district to engage in conduct that may violate the Establishment Clause has no bearing on any family court order. Accordingly, the Court should decide the case on the merits.

ARGUMENT

I. Respondent Has a Fundamental Constitutional Right to Have the Federal Courts Adjudicate This Claim

It is without question that there exists a fundamental constitutional right to access the courts of the United States:

> Decisions of this Court have grounded the right of access to courts in the Article IV Privileges and Immunities Clause, *Chambers v. Baltimore & Ohio R. Co.*, 207 U.S. 142, 148, 52 L. Ed. 143, 28 S. Ct. 34, 6 Ohio L. Rep. 498 (1907); *Blake v. McClung*, 172 U.S. 239, 249, 43 L. Ed. 432, 19 S. Ct. 165 (1898); *Slaughter-House Cases*, 83 U.S. 36, 16 Wall. 36, 79, 21 L. Ed. 394 (1873), the First Amendment Petition Clause, *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741, 76 L. Ed. 2d 277, 103 S. Ct. 2161 (1983); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972), the Fifth Amendment Due Process Clause, *Murray v. Giarratano*, 492 U.S. 1, 11, 106 L. Ed. 2d 1, 109 S. Ct. 2765, n. 6 (1989) (plurality opinion); *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 335, 87 L. Ed. 2d 220, 105 S. Ct. 3180 (1985)

Christopher v. Harbury, 536 U.S. 403, 415 n.12 (2003). This "'well-established' right of access to the courts ... is one of th[e] aspects of liberty that [government] must affirmatively protect." *Lewis v. Casey*, 518 U.S. 343, 405 (1996) (Stevens, J., dissenting).[2] Thus, in order to infringe upon that right of

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[2] In *Lewis*, Justice Stevens argued in dissent that, "There is a constitutional right to effective access" and that "the Court's view of those requirements is excessively strict." *Id.* at 408. He also disapproved

access, each actor in every branch of government – including this Court in this judicial branch – is required to meet certain conditions. It first must have a compelling interest. *Bates v. Little Rock*, 361 U.S. 516, 524 (1960) ("Where there is a significant encroachment upon personal liberty, [government] may prevail only upon showing a subordinating interest which is compelling."). If such an interest is shown, government must then narrowly tailor its laws to meet that interest. *Reno v. Flores*, 507 U.S. 292, 301-302 (1993) ("[T]he Fifth ... Amendment['s] guarantee of 'due process of law' [includes] a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." (Emphasis in original.)). Finally, the burden of proof to show that the laws are narrowly tailored to serve the given interest lies upon the government. "[W]ell-established First Amendment principles ... hold[s] the Government to its constitutional burden of proof." *Ashcroft v. ACLU*, No. 03-218, slip op. at 1 (June 29, 2004). This is a grave obligation placed upon each governmental body. "[T]o demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

With a "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976), the Court must be certain that any decision to overrule that "unflagging obligation" is well founded, not only in theoretical notions but in the actual facts at hand. Thus, while there is a "prudential" need "for the federal

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of the Court's "expanding standing requirements here and limiting rights there," *Id.* at 409.

courts to leave delicate issues of domestic relations to the state courts," *Elk Grove*, No. 02-1624, slip op. at 9, that need does not apply where – as here – the merits issue is unrelated to any domestic relations order. Furthermore, if the Court truly has any family law concerns regarding standing, they "could be addressed with a simple remand." *Lewis v. Casey*, 518 U.S. at 410 (Stevens, J., dissenting).

II. Certification to the California Supreme Court Impairs Respondent's Fundamental Constitutional Right of Access in a Less Restrictive Manner than Dismissal

Even if the custody issues are considered sufficiently related to the merits question as to justify "prudential" concerns, dismissal for lack of standing is not the least restrictive means available to handle the matter. As the Court just explained in terms of an associated First Amendment liberty interest:

> In considering this question, a court ... asks what is the least restrictive alternative that can be used to achieve [its] goal. The purpose of the test is not to consider whether the challenged restriction has some effect in achieving [the government's] goal, regardless of the restriction it imposes. The purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to assure that legitimate speech is not chilled or punished.

Ashcroft v. ACLU, No. 03-218, slip op. at 7. Here, legitimate use of the federal courts is being "chilled or punished." If parents have claims that may justifiably be brought into the

federal court system, they shouldn't have to fear that six years of diligent efforts will be simply cast aside for unanticipated "prudential" reasons. California may well deny that "the disputed family law rights are entwined inextricably with the threshold standing inquiry." *Elk Grove*, slip op. at 10 (n.5). Especially where a State has chosen to make readily available a means of answering the federal courts' concerns,[3] it would seem that those means ought to be employed.[4] In fact, a strong argument can be made that not using those means runs counter to "prudential" considerations, since it fails to respect the legal processes that the State has decided to put into place. *Konigsberg v. State Bar of California*, 353 U.S. 252, 276 (1957) (Frankfurter, J., dissenting) ("The procedure of making sure, through appropriate certification by a state court ... is a safeguard against infringement of powers that belong to the States.")

In this case, one of California's citizens has had a fundamental constitutional right placed at risk. California has chosen to implement a system of certification to its own Supreme Court as a readily available option to protect its citizens from the loss of such rights. Strict scrutiny mandates that this Court – like all other governmental actors – use the "least restrictive" methodology when attempting to further

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[3] California permits certification to its Supreme Court pursuant to California Rule of Court 29.8(a): "On request of the United States Supreme Court, a United States Court of Appeals, or the court of last resort of any state, territory, or commonwealth, the Supreme Court may decide a question of California law if: (1) the decision could determine the outcome of a matter pending in the requesting court, and (2) there is no controlling precedent."

[4] The California Supreme Court has accepted questions for certification in numerous Ninth Circuit cases. *See, e.g., S. Cal. Edison Co. v. Lynch*, 353 F.3d 648 (9th Cir. 2003); *Vu v. Cent. Dist.*, 291 F.3d 603 (9th Cir. 2002); *Ventura Group Ventures, Inc. v. Ventura Port Dist.*, 17 Fed. Appx. 676 (2001); *Blue Ridge Ins. Co. v. Jacobsen*, 10 Fed. Appx. 563 (2001); *Nordyke v. King*, 229 F.3d 1266 (9th Cir. 2000).

its goals. The Court, itself, has recognized that "certification requests meri[t] ... respectful consideration," *Arizonans for Official English v. Ariz.*, 520 U.S. 43, 78 (1997), and noted that "[t]aking advantage of certification made available by a State may 'greatly simplify' an ultimate adjudication in federal court.." *Id.* at 79. If Respondent's right to make his claims has been preserved under the current custody order, certification will appropriately attend to the "prudential" concerns without abrogating Respondent's fundamental right to do as every other citizen-parent may do: i.e., seek redress in the federal court system for violations of federal constitutional protections.

III. The Issue – Which is Limited to a Governmental Violation of the Establishment Clause – Has Been Mischaracterized

The Court wrote, "The California cases simply do not stand for the proposition that Newdow has a right to dictate to others what they may and may not say to his child respecting religion." But Respondent has never objected to what "others" say to his child. His objection is to what the government says to her. "[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Westside Community Bd. of Ed. v. Mergens*, 496 U.S. 226, 250 (1990). Every school morning in her public school, Respondent's daughter is told that her father's religious beliefs are wrong, unworthy and inferior. Nothing in the custody order seeks to (or could permissibly) affect that circumstance.

If Elk Grove's teachers started each day by having their students stand and recite in unison that Jews are bad because they killed Jesus, or that Blacks are an inferior race, it's difficult to imagine that Jewish and Black parents would be precluded from

seeking relief in the federal courts. This would be true irrespective of the other parents' opinions, the child's opinions, or the custody orders of the Family Court. In terms of standing, the instant case is identical. The denigration of Respondent and his religious belief system – imparted by Elk Grove's teachers before the eyes of his child – differs from that which would be involved in the aforementioned Jewish or Black examples only by degree. In all three cases, there exists a personalized, discrete and concrete injury unrelated to any matter in the Family Court.

CONCLUSION

Respondent – a parent who lives with his daughter in the home they share an average of ten days of every month, *J.A.* 122 – has sought relief from a perceived federal constitutional violation in the federal courts. Because that relief, if granted, will in no way interfere with any custody orders, he requests that the Court reconsider its determination that he lacks standing to bring his claim.

Respondent shares "joint legal custody" of his child with the child's mother. *J.A.* 127. Although the mother has final decision-making power, *Id.*, it is possible (if not probable) that – under California law – such final decision-making power has no effect upon Respondent's standing in this case. California has in place a ready procedure to inform this Court as to whether or not that is so. Rather than deprive Respondent of his fundamental constitutional right to utilize the federal courts (because of this standing question), this Court should (a) be guided by its longstanding rules regarding fundamental rights, (b) apply the mandates of strict scrutiny, (c) respect California's decision to provide a means of handling these exact situations, and (d) certify the question to that state's Supreme Court.

Respectfully submitted,

July 6, 2004

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CERTIFICATE OF PARTY UNREPRESENTED BY COUNSEL

Pursuant to Supreme Court Rule 44, the undersigned certifies that this petition is presented in good faith and not for delay.

July 6, 2004

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